

REMARKS

Applicant has substantially narrowed the independent claims in view of the prior art cited by the examiner in the last office action. The claims as now presented are patentable for the following reasons.

Before addressing the specific features of applicant's invention that distinguish it from the prior art, applicant first asks the examiner to consider an overview perspective of applicant's invention. Applicant's tool is designed for a specific purpose and has a specific utility. That utility is to move a row of food workpieces from one position on the grill and drop them off at another. Applicant's tool speeds up the cooking process because it allows simultaneous movement of a row, instead of the conventional movement of the food workpieces one at a time. Additionally, applicant's tool also has the advantages that it retains the juices on the tool so they too are transferred to the new location and it prevents spillage and dripping as the food workpieces are moved across the grill to a new location.

The structural features that distinguish applicant's invention from the prior art are what makes applicant's tool useful, far more useful, for accomplishing the purpose of applicant's invention than use of any of the prior art would be. Applicant is not attempting to distinguish the claimed structure on the basis of its use. But what is important is that it would not have been obvious to modify the prior art to accomplish applicant's use and utility. None of the prior art cited in this case or known to applicant has applicant's purpose. The previously applied prior art was a butler's tray and the currently applied prior art is two dust pans for attaching to a bag or pouch. The cited but

not applied art consists of a tool tray, an egg basket, a picnic basket and a trowel. The point is that the prior art provides no reason or suggestion to modify the prior art structures to make the prior art suitable for applicant's purpose because the purpose of the prior art is so remote from applicant's purpose.

If a person skilled in the art would try to use the dust pans of the prior art to transfer food products on a grill, they would be of little value or utility. Importantly, it would not have been obvious from the dust pans to modify them to be suitable for lifting food workpieces from a grill and transferring them to another location. The reason is that dust pans are non-analogous art because a person of ordinary skill in the art would not have considered looking at dust pans or butler trays in considering the problems solved and advantages gained by applicant's transfer tool.

MPEP 2141.01(a) is entitled Analogous and Nonanalogous Art. It includes:

TO RELY ON A REFERENCE UNDER 35 U.S.C. 103, IT MUST BE ANALOGOUS PRIOR ART

The examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). See also In re Deminski, 796 F.2d 436, 230 USPQ 313 (Fed. Cir. 1986); In re Clay, 966 F.2d 656, 659, 23 USPQ2d 1058, 1060-61 (Fed. Cir. 1992) ("A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem."); (emphasis added)

Applicant respectfully submits that a person of ordinary skill in the art would not logically have considered dust pans as offering solutions to applicant's problem of how to lift a row of food products from a grill and deposit them elsewhere while retaining the

juices without spilling the juices along the way. Dust pans are not used for food. Dust pans are operated entirely differently because a second tool, ordinarily a broom, is used to push the dirt onto the dust pan. Dust pans are not used by sliding them underneath an object. Consequently, the dust pan art is non-analogous because of the very different objects they handle, their very different purpose and because they are operated differently.

Applicant asks the examiner to additionally consider the following structural distinctions that distinguish applicant's transfer tool from the prior art, provide the new advantages of the invention and therefore make it patentable.

Aspect Ratio

As explained in the application and illustrated in Figs. 7 and 8, the purpose of applicant's transfer tool is to slide the tool simultaneously under a row of food workpieces, lift and move them to another location, and drop them, still in a row, at the second location. The ability to lift a row of food workpieces simultaneously is the result of the aspect ratio of applicant's tool. More specifically, the panel of the tool is the length of a row of multiple workpieces that will be picked up and the width of a food workpiece. If the length is less, fewer workpieces could be loaded. If the length is longer than a row, the excess would not accomplish anything useful and would make the tool more difficult to manipulate. If the width is less than the workpiece size, workpieces would not be fully supported and if the width is more, the excess would be useless and would make it more difficult to manipulate the tool under the workpieces.

"Aspect ratio" is the way to state in a claim that the tool must be long and narrow and to state how long and narrow. Understandably, an examiner would object to a claim as being indefinite if the claim merely said "long and narrow". "Aspect ratio" is a way to recite the long and narrow feature without being indefinite. Aspect ratio is the ratio of the length to the width of the panel of applicant's transfer tool onto which the food workpieces are slid. The length is the dimension in the direction of the handle. This is apparent from claim 1, element (a) which recites the open edge as being longitudinal. Longitudinal is generally understood as the longer direction of an object. The width is the lateral distance, that is the distance from the long open side to the opposite side. Thus, claim 1, now limited to an aspect ratio of at least 3:1, is saying that the panel length, the length along the open edge, is at least 3 times longer than the width. The most preferred dimensions stated in paragraph [0027] of the application provide an aspect ratio of 1:5.11; that is, the length is 5.11 times as long as the width.

Both of the references have an aspect ratio of their bottom panel of approximately 1:1. In fact, measurement of the drawings of Bartholomew, Figs. 2 and 3, shows that the length of its open lip or edge is less than the distance from the open edge to the opposite side.

In the phone conference of 9/6/05, the examiner expressed some uncertainty about the relationship of the aspect ratio claims 14, 16 and 18. Regarding claim 14, an aspect ratio of at least 3:1 means that the length is at least 3 times longer than the width. Since that limitation has now been incorporated into claim 1, claim 14 is canceled. With respect to claim 16, which was dependent on claim 14 and is now dependent from claim 1, the

limitation that the aspect ratio is at least 4:1 means that the panel is even more elongated than in claim 1, with the length being at least 4 times longer than the width. This is more desirable than 3:1. With respect to claim 17, an aspect ratio of at least 5:1 means even more elongated, the length being at least 5 times longer than the width, which is the most preferred.

In the last office action, the examiner observed that it would be obvious to modify the Bartholomew dust pan to make the panel narrow enough to pass through doorways or to receive a broomstick. The examiner concludes that this modification would require an aspect ratio of at least 5:1.

The examiner correctly observed that Bartholomew does not disclose dimensions. However, Bartholomew needs no changes to fit through a doorway or receive the bristles of a broom. Bartholomew discloses that it is a dust pan. Persons skilled in the art are familiar with the normal dimensions of a dust pan and would expect Bartholomew's dust pan to be approximately the same. Bartholomew's dust pan is already, like all dust pans, small enough to go through a door. Aspect ratio has nothing to do with the size of an object. It is a ratio of one dimension to another. In order to be able to get through a doorway, it is only necessary that the dust pan not be larger than the door opening. Thus, Bartholomew would need no modification to be able to go through a door. It already can.

The term "broomstick" as used by the examiner is, as a result of the telephone inquiry to the examiner, understood to mean the bristles of a broom. The aspect ratio does not determine whether the dust pan is wide enough to receive the broom. The width of the dust pan determines that.

Since both prior art references are dust pans, neither needs modification to make them capable of going through a door or receiving the bristles of a broom. More importantly, modification of the aspect ratio of the references is not obvious from the prior art because aspect ratio would not determine whether the dust pan can go through a door or receive a broom.

Consequently, there is no reason in the prior art to modify the aspect ratio of the dust pans of the references and no reason to modify them to at least 3:1. In fact, doing so would make them less useful, because, if they remained approximately the same width as known dust pans but made to have a 3:1 aspect ratio, they would have less width onto which dirt could be swept. That is why dust pans are made with an aspect ratio of approximately 1:1. Yet it is the aspect ratio that enables applicant's tool to be useful for simultaneously lifting a row of several food workpieces from the grill making the tool useful as a transfer tool for a grill, but at the same time making the tool narrow enough to be able to manipulate under the row of food products. Applicant respectfully submits that this structural distinction from the prior art itself alone makes claim 1 patentable.

Upwardly Facing Concave Surface

A concave surface is a surface that has a depression, like a valley or "cave". A convex surface is the opposite. It is a hill or hump.

The panel of applicant's transfer tool has an upwardly concave surface. This means that it has a trough-like contour to hold the juices. This has two desirable advantages for the uses intended for applicant's tool. It permits juices to be picked up and

retained on the tool and prevents spillage as the workpieces are moved over the grill to a new location. This was the subject of claim 2 and is now incorporated into claim 1.

The prior art does not show a panel with an upwardly concave surface. Looking at the drawings of Bartholomew, it is apparent that Bartholomew has a series of lateral slats the tops of which are arranged along a plane (i.e. flat, not concave). Consequently, if the pouch of Bartholomew is laid upon those slats, it would form a flat, planar material forming the surface onto which dirt is swept. The side and front views make it clear that, contrary to the observation of the examiner in the last office action, that slats are flat or planar, not concave. Additionally, Bartholomew, beginning at line 34 and visible in Fig. 2, shows and describes a beveled edge with a tapered metal plate E. The purpose is to provide a thin front edge to allow sweepings to be pushed up the bevel onto the panel, like most currently available dust pans. This front bevel, if it is considered a part of a Bartholomew panel, shows the opposite of applicant's concave surface. It shows a convex surface.

Applicant would also note that, if the Bartholomew structure were used without the pouch, it would be simply a series of slats with spaces between them. Food products could not be slid onto it because they would bend and run into the slats. If used with the pouch, there would be a flexible pouch material that would simply make a mess if used with food products from a grill.

The panel of Carrillo also is not concave. It is planar; that is the Carrillo panel is flat. That can be seen from observation of the end edges of Carrillo's "main member" 20 in the Figures.

It would not have been obvious to modify the prior art to make them concave. The dust particles swept onto a dust pan are dry and would not spill from the dust pans. There is no teaching to make it concave. However, applicant is dealing with the liquid juices of cooking food products and this concave structural feature adds further utility to applicant's tool.

Rigid Handle

Applicant also added the limitation to the independent claims that the handle is rigid. This is not new matter because paragraph [0020] describes the preferred material as metal. Metal is obviously rigid. This is an even further distinction from Carrillo. Carrillo would be worthless for the use for which applicant's transfer tool is intended because it has a flexible strap 40. Although Carrillo does not say his strap is flexible, most straps are flexible. More importantly, Carrillo describes his strap as removably coupled to his side members. Since the illustrated coupling means is a releasable buckle arrangement, it is apparent from the Carrillo description that the Carrillo "strap" is a belt that is bent around his side members 30 and 32 and the clips at the ends inserted into the buckle part attached to the side members. Therefore, it must be flexible.

Carrillo would be worthless for applicant's purpose because, if a person grasped the strap of Carrillo and tried to push the flat plate of Carrillo's dust pan under a food workpiece, the flexible handle would twist and move making it difficult to push the panel of Carrillo's dust pan under the food workpieces. More importantly, when the person attempted to tilt the Carrillo dust pan to drop the workpieces from the tool onto a new

location on the grill, the handle of Carrillo would twist with the panel remaining flat. Sufficient additional twisting might be enough to tilt the panel and drop the workpieces, but far more twisting would be required. That would make the Carrillo structure unsuitable for applicant's purpose.

Conclusion

The claims are allowable because:

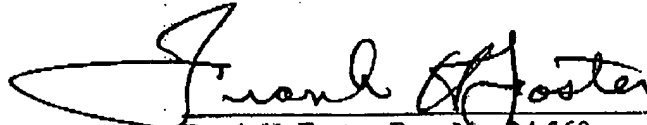
- (1) the prior art does not show the aspect ratio described in the claims, or the concave panel feature described in the claims and most importantly does not show the combination of those features;
- (2) it would not have been obvious from the prior art to modify the dust pans of the prior art to have these features because there is no teaching or motivation in the prior art for making such modifications, especially since the prior art is non-analogous;
- (3) these features give applicant's tool the advantages in their use and operation, described above and in the application, that the dust pans of the prior art would not have if they were used for transferring food workpieces on a grill.

Therefore, reconsideration and allowance are respectfully requested.

The Commissioner is authorized to charge Deposit Account No. 13-3393 for any insufficient fees under 37 CFR §§ 1.16 or 1.17, or credit any overpayment of fees.

Respectfully submitted,

9/8/05
Date of Signature


Frank H. Foster, Reg. No. 24,560
KREMBLAS, FOSTER, PHILLIPS & POLLOCK
7632 Slate Ridge Blvd.
Reynoldsburg, OH 43068
Voice: 614/575-2100
Fax: 614/575-2149
email: ffoster@ohiopatent.com

Appended: Claim Determination Record
Extension of Time Request
Fee Transmittal Form
Credit Card Form

Last printed 9/8/2005 8:17 AM
I:\client\docs\w\wendy's intl., inc\208 transfer tool\response3.doc